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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 504

GERTRUDE MACDONALD,
Appellant,

vs.

LA SALLE NATIONAL BANK, CONSERVATOR,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

REPLY OF APPELLEE TO APPELLANT'S ANSWER TO MOTION TO DISMISS OR AFFIRM.

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Of Counsel:
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This brief is filed on behalf of Appellee, La Salle National Bank, in response to Appellant's Answer to the Motion of Appellee to Dismiss or Affirm.

STATEMENT.

On September 17, 1957, Appellant filed herein her appeal from the judgment of the Supreme Court of Illinois entered March 20, 1957, in the case entitled "*Gertrude Macdonald, Appellant* v. *La Salle National Bank, Conservator, et al., Appellees,*" reported at 11 Ill. (2d) 122; together with her

Statement as to Jurisdiction in which, at page 4, she stated the Question Presented as being:

> "Is the statutory provision of the State of Illinois that a conservator may be appointed for any person who by reason of any 'physical incapacity or incompetency is incapable of managing and caring for his estate' unconstitutional, being in violation of 'due process of law' as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States?"

On October 21, 1957, Appellee filed herein its Motion to Dismiss or Affirm and Brief in Support Thereof, advancing as grounds for such motion:

> (a) The judgment of the Supreme Court of Illinois rests on an adequate non-federal basis, namely, that appellant failed to show that she was originally adjudged an incompetent (in March, 1938) because of a physical incapacity and therefore failed to show wherein the alleged statutory defect adversely affected her; and
>
> (b) The "due process" question which appellant seeks to present by this appeal is not a substantial federal question for the reason that the statute complained of permitted a conservator of the estate to be appointed only for one found "incapable of managing and caring for his estate," and clearly provided appellant with notice and an opportunity to be heard.

On November 13, 1957, Appellant filed herein her Answer to Motion to Dismiss or Affirm. In that Answer Appellant does not directly treat with or discuss either of the grounds urged in support of the Motion of Appellee to Dismiss or Affirm, but takes the following positions:

(1) At pages 1 and 2 she states that La Salle National Bank neither individually nor as conservator can use bank funds or Appellant's funds to oppose Appellant's personal interest in the case at bar, and that La Salle National Bank cannot properly interject itself in this case "in which it has no interest".

(2) At page 3 of her Answer, Appellant refers to five exhibits filed herein on October 29, 1957, which she has numbered and described as follows:

"EXHIBIT I. Motion of Gertrude Macdonald, to Dismiss the Petition of La Salle National Bank to Oppose Appellant in the Probate Court because of possible '*De Son Tort*' Liability to the bank, individually.

"EXHIBIT II. 'Petition to Vacate and Set Aside Appointments of Conservators of the Person and Estate of Gertrude Macdonald, which Appointments Were Made Without Service of Process on Gertrude Macdonald, Without Giving Her an Opportunity to Be Heard, and Through the Perpetration of a Fraud Upon Gertrude Macdonald and Upon the Probate Court of Cook County, Illinois.' (July 12, 1955.)

"EXHIBIT III. Order entered by the Probate Court on September 13, 1955, continuing the above-captioned petition generally and without date.

"EXHIBIT IV. An Affidavit procured from Annabelle G. Hansen, which evidence substantiates the fraud perpetuated on appellant, as fully described and set forth in Exhibit II.

"EXHIBIT V. Evidence showing attempts made to have the Annabelle G. Hansen Affidavit entered of record."

Said "Exhibits" were not, and do not purport to be, a part of the record that was before the Supreme Court of Illinois in this case. Exhibits IV and V do not purport to be certified by the Clerk of any Court.

From these "Exhibits", Appellant argues that when she was originally adjudged an incompetent in March, 1938, she was not served with process nor given an opportunity to be heard, and therefore this Court should deny Appellant's Motion to Dismiss or Affirm.

Since "Exhibit II" was not filed in the Probate Court of Cook County until July 12, 1955, it seems appropriate to note here that James Macdonald, brother of Gertrude,

was conservator of the estate of Gertrude Macdonald from October 26, 1938 until September, 1951, when he was removed for failure to comply with orders requiring him to account, and La Salle National Bank was appointed, Rec. 3 (19-20). He continued as conservator of her person until removed in the current proceedings, Rec. 3 (23).

ARGUMENT.

I.

The propriety of La Salle National Bank appearing and participating in this case is a non-federal question decided favorably to the Bank by the Supreme Court of Illinois.

In her Brief in the Supreme Court of Illinois, Appellant took the position that La Salle National Bank could not oppose her.

Accordingly, prior to filing a brief, La Salle National Bank, individually, moved for leave to file a brief and filed an affidavit in support thereof, pointing out that in connection with Appellant's Amended Petition filed May 13, 1955, the Probate Court of Cook County had caused a citation to issue to La Salle National Bank to show cause why it should not be removed as Conservator, Rec. 3 (14), and that the order of the Circuit Court of Cook County appealed from decreed that such citation be dismissed, Rec. 3 (23). Appellant filed objections to such motion in the Supreme Court of Illinois. However, one of the Justices of said Court, in vacation, entered an order giving leave to "La Salle National Bank individually, Respondent-Appellee," to file its Brief (see Appendix). The question was not argued further by Appellant in the Supreme Court of Illinois.

Since the notice of appeal to this Court filed by Appellant did not call for the order of the Supreme Court of Illinois giving leave to file its brief to "La Salle National Bank, individually, Respondent-Appellee," and since Appellee had no reason to believe that question would be raised before this Court, said order and the motion and objections preliminary thereto were not designated as a part of the record to be filed with this Court.

However, a copy of the Motion of La Salle National Bank individually for leave to file brief, Affidavit in support, Objections of Gertrude Macdonald, and Order giving leave to La Salle National Bank individually to file brief, all duly certified by the Clerk of the Supreme Court of Illinois, are filed herewith. For convenience, these documents are reprinted in the Appendix hereto.

We respectfully submit that the attack made by Appellant in her Answer to Motion to Dismiss or Affirm on the propriety of La Salle National Bank opposing her appeal to this Court is (1) not within the reasonable scope of the question presented to this Court at page 4 of Appellant's Statement as to Jurisdiction, and (2) involves a non-federal question which was decided favorably to Appellee by the Supreme Court of Illinois.

II.

The question of whether Appellant was duly served with process prior to being adjudicated an incompetent is still pending before the Probate Court of Cook County, was not before the Supreme Court of Illinois, and is not properly before this Court.

The Petition which was the basis of the judgment of the Supreme Court of Illinois appealed from, and which is properly before this Court, is the Amended Petition filed by Appellant in the Probate Court of Cook County on May 13, 1955, Rec. 3 (5-13).

That Amended Petition raised the question of the constitutionality of the statutory definition of an incompetent, and on that ground requested that the Probate Court vacate and set aside the appointment of a conservator for the estate of Gertrude Macdonald.

That Amended Petition does not allege that Gertrude Macdonald is now competent, and does not question the sufficiency of the hearing in March, 1938, respecting incompetency, nor the fact that summons was duly served upon her. In fact, paragraph 2 of that Amended Petition, Rec. 3 (6)—which was signed by Gertrude Macdonald—affirmatively alleges:

> "On the day the petition (meaning the petition praying for a conservator) was filed Gertrude Macdonald was served with a summons."

The Petition referred to on page 3 of Appellant's Answer to Motion to Dismiss or Affirm and there designated as Exhibit II, was filed in the Probate Court of Cook County on July 12, 1955. It alleges (contrary to the allegation of the May 13, 1955 Petition) that Gertrude Macdonald was not served with summons nor given an opportunity to be heard in connection with her adjudication as an incompetent in March, 1938, and requests the Probate Court to vacate the appointment of conservators for her estate on that ground.

As appears from Exhibit III referred to on page 3 of Appellant's Answer to Motion to Dismiss or Affirm, the Probate Court of Cook County continued that second Petition generally by order entered September 13, 1955.

It appears from page 6, *et seq.* of Appellant's Answer to Motion to Dismiss or Affirm that she believes the order of the Probate Court continuing her second Petition generally without date was erroneous and deprived her of rights.

However, it is clear that neither her second Petition filed July 12, 1955, nor the propriety of the September 13, 1955 order of the Probate Court continuing that second Petition generally, is before this Court.[1]

Moreover, at the time the second Petition was filed, and on September 13, 1955, when it was continued generally, Appellant was represented by counsel, who did not withdraw from this case until May 18, 1956, Rec. 3 (17). Quite obviously, there was no point in proceeding on Appellant's second Petition filed July 12, 1955, when she already had an appeal pending from the order dismissing her Amended Petition filed May 13, 1955 which, if successful, would have made a hearing of the second Petition unnecessary.

Further, as pointed out by the Circuit Court of Cook County in its order, Rec. 3 (21-23), that second Petition remains pending and the order of the Circuit Court was without prejudice to any rights of Gertrude Macdonald

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1. The appeal of the order dismissing the Amended Petition filed May 13, 1955, was to the Circuit Court of Cook County, Illinois. On June 27, 1956, that Court entered its order dismissing said Amended Petition originally filed May 13, 1955, Rec. 3 (17-24). Paragraph 12 of that order reads as follows:

> "12. It appears from the findings in the order of the Probate Court entered July 22, 1955, which is here appealed from, that, after that Court had completed hearings on the amended petition of Gertrude Macdonald, which is now here on appeal, and which had been filed in that Court May 13, 1955, a new petition was filed in the Probate Court by Gertrude Macdonald, alleging for the first time that Gertrude Macdonald 'was and is not an incompetent person and not incapable of managing and controlling her person and estate', and also seeking to set aside the appointments of conservators of her person and estate on the ground of fraud. This new petition has been continued generally by the Probate Court, is still pending in that Court, and is not before this Court."

Paragraph D of that order, Rec. 3 (23) reads as follows:

> "D. This order shall not prejudice the right of Gertrude Macdonald to seek an adjudication restoring her competency in a manner provided by law, and shall not prejudice her rights, if any, with respect to the petition presented to the Probate Court July 12, 1955, which is described above."

with respect to that second Petition. It may be taken up and set for hearing on motion of either party.

Therefore, the order of September 13 '1955, continuing her second Petition generally did not deprive Appellant of a hearing on her second Petition. She is free now, as she always has been, to appear on motion at any time and request that her second Petition be set for hearing.

Implicit in Appellant's argument commencing at page 6 of her Answer to Motion to Dismiss or Affirm is the proposition that this Court should not only deny Appellee's Motion to Dismiss or Affirm, but that it should hear on the merits the issues raised by her second Petition and Exhibits I—V which she filed herein October 29, 1957, and which are listed on page 3 of her Answer to Motion to Dismiss or Affirm.

It is axiomatic that this Court, in reviewing a judgment on appeal, will not hear new evidence nor consider anything that was not a part of the record before the Supreme Court of Illinois. *Russell* v. *Southard*, 53 U. S. (12 How.) 139, 159 (1851); *Boone* v. *Chiles*, 35 U. S. (10 Pet.) 177, 208 (1836); *Mutual Life Insurance Co.* v. *Snyder*, 93 U. S. 393, 394 (1876).

Conclusion.

For the reasons stated in the motion of Appellee to dismiss the appeal from, or in the alternative to affirm, the judgment of the Supreme Court of Illinois, and for the reasons stated in Appellee's brief in support of that motion, we again submit that the motion should be granted.

Respectfully submitted,

JOHN R. NICHOLSON,
CHARLES M. NISEN,
Attorneys for Appellee,
La Salle National Bank.

Of Counsel:
NICHOLSON, NISEN & ELLIOTT.

APPENDIX.

The following were filed with, or entered by, the Supreme Court of Illinois on December 6 and 7, 1956:

Motion of La Salle National Bank, Individually, for Leave to File Brief and Any Additional Abstract and to Extend Time for Filing the Same.

Comes now La Salle National Bank, individually, Respondent-Appellee in the above-entitled cause, by Nicholson, Nisen & Elliott, its attorneys, and respectfully moves the Court that La Salle National Bank be given leave to file its Brief and Additional Abstract herein in its individual capacity, and that the time within which it may file such Brief and any Additional Abstract be extended from December 7, 1956, to and including December 27, 1956.

In support of this Motion, there is attached hereto the Affidavit of Charles M. Nisen.

Affidavit in Support of Motion of La Salle National Bank to Extend Time to File Brief and Additional Abstract.

Charles M. Nisen being first duly sworn on oath, deposes and says:

1. That he is one of the attorneys for La Salle National Bank respondent appellee;

2. This appeal is from an order of the Circuit Court of Cook County entered on appeal to that Court from the Probate Court of Cook County, which order dismissed a citation issued by the said Probate Court to La Salle National Bank to show cause why it should not be removed as Conservator of the estate of Gertrude MacDonald, In-

competent, and which order also dismissed and denied the Amended Petition of Gertrude MacDonald filed in said Probate Court seeking to vacate, for want of jurisdiction, various orders entered by that Court appointing Conservators and Successor Conservators, including the order appointing said La Salle National Bank as Successor Conservator.

3. In the Brief of Petitioner-Appellant at page 24, the Ward (citing *Cash* v. *Metropolitan Trust Co.*, 329 Ill. App. 561 (1946)), takes the position that the Conservator may not oppose her Amended Petition which seeks to have declared void her adjudication as an incompetent and the orders appointing Conservators for her.

4. In an effort to avoid the necessity of this Court passing on that issue, La Salle National Bank in its capacity as Successor Conservator, has decided not to file a brief in opposition to the Incompetent in this Court, particularly in view of this Court's order appointing Clarence E. Fox as its *amicus curiae*.

5. However, such *amicus curiae*, by virtue of his position, cannot represent or defend the individual interests of La Salle National Bank, and therefore La Salle National Bank desires to file a brief in its individual capacity. Nothing in the case of *Cash* v. *Metropolitan Trust Co.*, 329 Ill App. 561 (1946) tends to preclude a Conservator from protecting his individual rights, even though such be opposed to the Ward. In the *Cash* case, it appeared that the conservator had on several occasions filed briefs in the various stages of the protracted proceedings without its right to do so being questioned. Only the question of allowance of its expenses was involved in the *Cash* case and then only because the conservator sought to protect the rights of third parties in opposition to its ward.

6. We respectfully suggest that La Salle National Bank in its individual capacity is a "party" within the meaning

of Rule 39 of this Court, and as such is entitled to file a brief. The Judge of the Probate Court of Cook County, upon the filing of the Amended Petition of Gertrude MacDonald here involved, caused a citation to be issued to La Salle National Bank (not as Conservator) to show cause why it should not be removed for the reasons stated in such Amended Petition, and that citation was dismissed by the order of the Circuit Court which is appealed from (Abst. 23). That proceedings for removal of a conservator, guardian, administrator or executor are addressed to the *individual* holding such office is clear from Section 278 of the Probate Act, as well as from the decision in *Hanifan* v. *Needles*, 108 Ill. 403, 409, 410 (1884) where this Court held removal of an executor or administrator without prior service of a citation for removal deprived the individual "citizen" of a right recognized by law.

7. Whether or not La Salle National Bank is to be regarded as a "party" in its individual capacity, we respectfully suggest that it should in equity be granted leave to file a brief in its individual capacity to protect itself against the possible consequences of an adverse ruling of this Court. That this proceeding was initiated and is being carried on with a view to surcharging La Salle National Bank with *de son tort* liability is evidenced from the Circuit Court order appealed from wherein the Ward's sister-in-law, Mrs. Jean MacDonald, stated restoration proceedings were not being sought because they did not want to prejudice the alleged rights of Gertrude MacDonald to attack the validity of appointments of Conservators (Abst. 20, 21); by the fact that Gertrude MacDonald knew she had signed the Petition filed by her but "does not know its contents or purpose" (Abst. 21); and by the fact that the case was argued by the Ward's sister-in-law in the Circuit Court (Abst. 18). That such liabilities as a conservator *de son tort* might be of a

substantial nature is evident from the fact that as Conservator, La Salle National Bank initiated and successfully prosecuted a proceeding to terminate a trust in which the Incompetent was interested, which proceeding was appealed to and affirmed by this Court in the case of *La Salle National Bank, Conservator, etc.*, v. *Jean MacDonald*, 2 Ill. (2d) 581 (1954). Moreover, since that decision, virtually all of the several parcels of real estate in the trust have been sold by order of the Circuit Court. Consequently, La Salle National Bank has a very real interest in the outcome of these proceedings and would be a person aggrieved by any reversal of the Circuit Court order appealed from.

8. Until the appointment of Clarence E. Fox as *amicus curiae* on December 3, 1956, La Salle National Bank was unable to decide whether to seek to file a single brief in this cause both as Conservator and for protection of its individual interests, or to seek solely to protect its individual interests. The preparation of a brief and any additional abstract was necessarily delayed, both for this reason and because the Bank in its capacity as Successor Conservator is represented by different counsel than the counsel which represents the Bank in its individual capacity. An extension of twenty days until December 27, 1956, for La Salle National Bank to file its individual brief herein will not delay the hearing of this cause at the January Term of this Court, particularly since oral argument has not been requested by Petitioner and will not be requested by La Salle National Bank.

Further, affiant saith not.

/s/ CHARLES M. NISEN.

Subscribed and sworn to before me this 4th day of December, 1956.

/s/ GLADYS M. CHRISTIANSEN.
Notary Public.

(NOTARIAL SEAL)

OBJECTIONS OF GERTRUDE MACDONALD TO MOTION OF LA SALLE NATIONAL BANK, INDIVIDUALLY, FOR LEAVE TO FILE BRIEF AND ANY ADDITIONAL ABSTRACT AND TO EXTEND TIME FOR FILING THE SAME.

Now comes Gertrude Macdonald and objects to the motion of the La Salle National Bank, and in support of said objections says as follows:

The La Salle National Bank has an interest in the above entitled cause only as conservator. The said La Salle National Bank is fully aware of the fact that as such conservator it may not oppose the petition of Gertrude Macdonald, for such opposition constitutes a breach of trust on the part of the La Salle National Bank. To circumvent its duty as such conservator, it now asks this Honorable Court to be allowed to file a brief in its individual capacity, although the said La Salle National Bank was never a party in its individual capacity in the above entitled cause and was at all times a party herein in its capacity as conservator. The La Salle National Bank has filed an affidavit in direct contradiction to the record in this case. We submit that *the LaSalle National Bank cannot shirk its duty as a conservator by merely masking itself under the label of "individually."* If this be permitted, then every conservator could oppose the interest of its ward by merely attaching to itself the label "individually," and thus avoid its duty as a trustee and fiduciary.

WHEREFORE, Gertrude Macdonald moves this Honorable Court to deny the motion of the La Salle National Bank.

ORDER GIVING LEAVE TO LA SALLE NATIONAL BANK INDIVIDUALLY TO FILE BRIEF AND ANY ADDITIONAL ABSTRACT AND EXTENDING TIME FOR FILING THE SAME.

This cause coming on to be heard on the motion of La Salle National Bank individually, Respondent-Appellee, supported by Affidavit, for leave to file its Brief and Additional Abstract herein in its individual capacity, and to extend the time for filing the same from December 7, 1956, to and including December 27, 1956, due and timely notice having been given to all persons entitled thereto;

IT IS ORDERED for good cause shown, that leave be, and the same hereby is given to La Salle National Bank individually, Respondent-Appellee to file its Brief and any Additional Abstract herein in its individual capacity, and the time within which such Brief and any Additional Abstract may be filed is hereby extended to and including December 27, 1956.

ENTER:

/s/ WALTER V. SCHAEFER,
Justice of the Supreme Court of Illinois.

December 6, 1956.